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No. 92-1888

In The

Supreme Court of the United States

October Term, 1992

CONSTRUCCIONES AERONAUTICAS, S.A., a Foreign Corporation,

Petitioner,

vs.

DIERDRE M. SHERER, Administratrix of the Estate of David W. Sherer, deceased,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT A. MARCIS
Counsel of Record
SPANGENBERG, SHIBLEY, TRACI, LANCIONE & LIBER
Attorneys for Respondent
1500 National City Bank Building
Cleveland, Ohio 44114
(216) 696-3232

3873
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTION PRESENTED FOR REVIEW

Whether a corporate defendant, which is an instrumentality of a foreign sovereign, should be dismissed from an action because of a technical defect in service of process, where it is undisputed that the defendant was served with the summons and complaint, understood the nature of the action when the complaint was served, and has not suffered any prejudice as a result of the method of service.

STATUTES INVOLVED

This case involves the application of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.* (1988), and specifically the FSIA's provision regarding service of process on an instrumentality of a foreign sovereign, 28 U.S.C. § 1608(b) (1988). Section 1608(b) of the FSIA is reprinted in the appendix to the petition.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This wrongful death/product liability action arose out of an airplane crash that occurred on March 4, 1987, at the Detroit Metropolitan Airport. Nine persons were killed in the crash, including respondent's husband, David Sherer. The airplane was manufactured by petitioner, Construcciones Aeronauticas, S.A. ("CASA"). As a result of the March 4, 1987 tragedy, at least ten lawsuits were filed.

Respondent filed her lawsuit against CASA on March 3, 1989, in the Court of Common Pleas, Crawford County, Ohio. CASA was served as a foreign defendant pursuant to Rule 4.5 of the Ohio Rules of Civil Procedure, which is substantially identical to Rule 4(i) of the Federal Rules of Civil Procedure. The clerk of courts mailed the summons and complaint, via registered mail, return receipt requested, to CASA's principal place of business.

Approximately sixty days after the complaint was filed, petitioner removed the action to federal court and served its answer to respondent's complaint. The answer raised twenty one affirmative defenses, including lack of personal jurisdiction, misuse or alteration of the aircraft, lack of proximate cause, comparative negligence, a claim for indemnity from other persons or parties, lack of capacity by plaintiff to bring the action, lack of privity between plaintiff and CASA, the running of applicable statutes of limitations, improper service of process, and lack of subject matter jurisdiction.

Over the course of the litigation that ensued, petitioner attended three status calls, and twice moved for dismissal of the action for reasons other than insufficient service of process or lack of personal jurisdiction.

Petitioner also participated in discovery. CASA served respondent with interrogatories and requests for production of documents, which respondent answered, and requests for admissions. Respondent and petitioner entered into a stipulation of confidentiality of documents produced by CASA. Although the action was pending for over twenty-one months, petitioner did not, at any time after answering the complaint, raise with the court the issues of service of process or lack of personal jurisdiction.

On December 11, 1990, petitioner agreed to allow respondent to dismiss the action without prejudice pursuant to Rule 41(a)(1) of

the Federal Rules of Civil Procedure. Ohio substantive law provided respondent one year in which to refile her claim.

Upon discovering new information which indicated that CASA was a proper party to the lawsuit, respondent moved for and was granted leave to file an amended complaint renaming petitioner as a defendant. On April 10, 1991, respondent filed her amended complaint, and petitioner was served as it had been previously; the summons and amended complaint were sent via registered mail, return receipt requested, to CASA's principal place of business. It is undisputed that CASA's legal department received the amended complaint on May 6, 1991.

On June 3, 1991, more than two years after respondent commenced this lawsuit, and after the applicable statute of limitation would have run if not tolled, petitioner filed a motion to dismiss this action for insufficient service of process and lack of personal jurisdiction. In its motion, petitioner argued that dismissal was proper because respondent had failed to comply with the technical requirements of the FSIA in that respondent had failed to serve a Spanish translation of the complaint.[1] Not only was it undisputed that petitioner received actual notice of the lawsuit, but in fact CASA did not even allege that it had suffered any prejudice by respondent's omission.

In her brief in opposition, respondent argued that the purpose of the FSIA, to ensure that actual notice of the action is received by the foreign defendant, was achieved, and that dismissal was improper under the circumstances. Respondent also argued that

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1. Petitioner now claims that service was improper because "respondent failed to follow the hierarchical order of the service of process provisions in the statute." (Petition at 3). Petitioner failed to raise this alleged defect in service in either the district court, or the Sixth Circuit Court of Appeals, and accordingly, has waived the right to so argue to this Court.

CASA had waived any defect in the method of service through its participation in lawsuit. Nevertheless, on October 29, 1991, the district court dismissed petitioner from this action. The Sixth Circuit reversed the district court, concluding that service was sufficient and personal jurisdiction was attained.

REASONS FOR DENYING THE WRIT

Petitioner's argument that a conflict exists in the lower courts relies entirely upon the dicta of the decisions that it cites and fails to acknowledge the varying facts and circumstances of each case. A review of those decisions confirms that the alleged conflict is simply illusory; in those actions in which the undisputed facts establish that the defendant received actual notice of the lawsuit and suffered no prejudice by the plaintiff's technical deficiency in the method of service, courts have consistently denied the defendant's motion to dismiss the action. Furthermore, where courts have found that service was insufficient but the defect was readily curable, they have refused to dismiss the action and instead have afforded the plaintiff time to reserve the defendant. Courts have dismissed actions for insufficient service under the FSIA where the defendant failed to receive timely notice, and/or suffered prejudice by the defect in service.

In deciding that the district court erred in dismissing CASA from this action, the Sixth Circuit Court of Appeals carefully analyzed the holdings of the federal courts that had ruled on this issue. The Sixth Circuit correctly noted that the common theme throughout those decisions, whether they purported to adopt the "strict compliance" or the "substantial compliance" standard, "is the importance of actual notice to the defendants." *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246 (6th Cir. 1993) (App. 7a).

Although petitioner participated in this litigation for over one

and one-half years, and concedes that it suffered absolutely no prejudice by respondent's failure to serve a translated complaint, petitioner seeks to avoid adjudication on the merits in this wrongful death action due to a technical defect in service that could have been readily cured had the district court afforded respondent time to do so. Petitioner's position is inconsistent with the weight of authority and the policy behind the FSIA and does violence to the clear mandate of this Court that, whenever possible, cases should be resolved on the merits rather than procedural technicalities.

I.

THERE IS NO REAL CONFLICT IN THE LOWER COURTS REGARDING THE APPLICATION OF THE SERVICE REQUIREMENTS OF THE FSIA.

Petitioner contends that a conflict exists between the courts that seemingly require strict compliance with the FSIA, and those that hold that substantial compliance with the Act is sufficient where the defendant receives actual notice of the lawsuit and suffers no prejudice by the technical deficiency in service. In support of its contention, petitioner lists cases from district courts in the Second, Fourth, and Ninth Circuits as requiring strict compliance with the FSIA's service provisions, and circuit court opinions of the Third, Sixth, and Eleventh Circuits as requiring only substantial compliance. A review of the cases cited by petitioner reveals that there is no true conflict in the decisions of these courts.

For example, petitioner cites *Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1044 (2d Cir. 1978) as requiring strict compliance with the service requirements of the FSIA. In *Gray*, however, the court did not dismiss the action

because the plaintiff failed to "strictly comply" with the FSIA, but rather because "the plaintiff's failure to comply with the explicit service requirements of the statute meant that the Congo Mission did not receive the requisite notice of the action against it." *Id.* at 820.

In *Gray*, dismissal would have been appropriate regardless of whether the court adopted the so-called "strict compliance" or the "substantial compliance" standard. The Congolese Mission had been served with a summons and complaint in English, which was not accompanied by a translation. The Mission did not answer the complaint, and the plaintiff subsequently obtained a default judgment in state court, successfully prosecuted a foreclosure action, purchased the property at the foreclosure sale, and initiated proceedings to have the Congolese evicted from the property. It was not until the latter action was taken by the plaintiff that the defendant obtained legal counsel in the United States. The defendant then removed the action to federal court and moved for dismissal, arguing that the plaintiff's failure to comply with the FSIA rendered service fatally defective.

In dismissing the action, the district court explained:

> It is obvious that the officials of the Congo Mission did not understand their rights under American law, for they did not employ attorneys nor take any other legal actions until threatened with impending eviction at the hands of the "sheriff of the County of New York."

Id. at 821. The Second Circuit affirmed *Gray* without opinion at 580 F.2d 1044 (2d Cir. 1978).

Subsequent to the decision of the Second Circuit in *Gray*,

district courts within the circuit have had numerous opportunities to consider the proper application of the service requirements of the FSIA. The courts have consistently held that dismissal is an improper remedy for a defendant who complains of a technical deficiency in service, if actual notice of the action is received and the defendant admittedly suffers no prejudice due to the deficiency.

In *Banco Metropolitano v. Desarrollo de Autopistas,* 616 F. Supp. 301 (S.D.N.Y. 1985), the court noted that because the defendant received actual knowledge of the summons and complaint, and substantial compliance with the FSIA had been achieved, it would be inappropriate to dismiss the action due to the plaintiff's technical noncompliance with the Act.

Where the defect in service can be readily cured without prejudice to the defendants, courts in the Second Circuit have granted the plaintiff leave to do so. For example, in *40 D 6262 Realty Corporation v. United Arab Emirates Government,* 447 F. Supp. 710 (S.D.N.Y. 1978), the court found that the plaintiff's method of service did not comply with the FSIA, but rather than dismiss the action, the court afforded the plaintiff the opportunity to reserve the defendant in accordance with the Act. Similarly, in *Lippus v. Dahlgren Mfg. Co.,* 644 F. Supp. 1473 (E.D.N.Y. 1986), the court ordered that plaintiff reserve the defendant, rather than grant the defendant's motion to dismiss, where service was held to be insufficient under the FSIA.

Finally, in an unreported decision, a district court in the Second Circuit dismissed a default judgment because the plaintiff had failed to comply with the service requirements of the FSIA when the underlying action was filed. In *First City, Texas Houston, N.A. v. Rafidain Bank,* No. 90 Civ. 7360, 1992 WL 296434 (S.D.N.Y. October 6, 1992), there was no finding that the defendant had received actual notice of the lawsuit, and the fact that the plaintiff obtained a default judgment indicated that the defendant was prejudiced by the deficiency in service.

Defendant also cites *Unidyne Corporation v. Aerolineas Argentinas*, 490 F. Supp. 391 (E.D. Va. 1984), and *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400 (E.D. Va. 1988) as cases in which the so-called "strict compliance" standard was applied. In *Unidyne*, however, the court dismissed the action not because the plaintiff failed to strictly comply with the FSIA, but rather because service was improper under the state long arm statute due to lack of personal jurisdiction. Accordingly, *Unidyne* does not support the petitioner's position.

LeDonne also fails to support petitioner's contention that the federal courts are split in their interpretation of the FSIA. In *LeDonne*, the court dismissed a default judgment, holding that the plaintiff had failed to obtain personal jurisdiction over the defendant in the underlying action, and therefore the judgment was invalid. The decision of the court was a result of the fact that the plaintiff had failed to serve, in any manner, the summons and complaint, and had failed to even attempt to serve a copy of the default judgment.

Petitioner contends that *Gerritsen v. Escobar*, 721 F. Supp. 253 (C.D. Cal. 1988), *aff'd*, 989 F.2d 340 (9th Cir. 1993), presents a conflict with the opinion of the Sixth Circuit. A review of the facts of *Gerritsen* does not establish such a conflict, because in *Gerritsen*, there was no finding that the defendant had actual notice of the suit, or that the defendant understood his rights under the laws of the United States.

II.

THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF THOSE COURTS THAT HAVE BEEN PRESENTED WITH ACTIONS INVOLVING SIMILAR FACTS AND CIRCUMSTANCES.

Petitioner contends, as a reason for granting the writ, that "the Sixth Circuit . . . has rendered a decision . . . in conflict with a decision of the Second Circuit in *Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1044 (2d Cir. 1978)." (Petition at 7). This contention is both misleading and inaccurate. It is misleading because the Second Circuit affirmed the district court's decision in *Gray* without opinion. Accordingly, it cannot be known which standard the Second Circuit applied in deciding that case. Nevertheless, petitioner repeatedly refers to the Second Circuit's decision in *Gray* as adopting the strict compliance standard.

Petitioner's contention is also inaccurate, because the Sixth Circuit expressly agreed with the holding in *Gray*, explaining that in *Gray* "the purpose of the FSIA was not served and the court properly dismissed the case for insufficient service." *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246 (6th Cir. 1993) (App. 8a). The Sixth Circuit explained, however, that under the facts of *Sherer*, strict enforcement of the technicalities of the FSIA would be inappropriate. The Sixth Circuit's decision is consistent with the decisions of the other federal courts that have been presented with similar fact patterns.

The Eleventh Circuit has held that "[t]he failure to follow precisely those steps in § 1608 designed to insure that actual service be made should not override and invalidate the fact that . . . notice was actually received." *Harris Corp. v. National Iranian Radio, Etc.*, 691 F.2d 1344, 1352 (11th Cir. 1982). The court

admonished plaintiffs to follow the service provisions of the FSIA, but noted that "the framework is designed to insure that foreign defendants will get notice," *Id.* at 1352 n. 16, and refused to dismiss the action because of a technical defect in service that did not result in prejudice to the defendant.

In *Obenchain Corp. v. Corp. Nacionale de Inversions,* 656 F. Supp. 435 (W.D. Pa. 1987), the District Court in the Western District of Pennsylvania held that dismissal is an improper remedy for a technical deficiency in service under the FSIA where actual notice is received:

> The purpose of the Act's requirements is to ensure actual notice to foreign states of the fact and substance of pending litigation. Where a party has received such notice, despite technical omissions in the manner of service, the purpose of the Act if not its letter has been satisfied.

Id. at 437 (citations omitted).

In *Banco Metropolitano v. Desarrollo de Autopistas,* 616 F. Supp. 301 (S.D.N.Y. 1985), the district court acknowledged the plaintiffs' failure to serve the defendant a translated copy of the complaint. The court, however, held:

> . . . in view of the receipt of actual knowledge of the summons and complaint . . . substantial compliance has been achieved . . . Given the nature of the issues presented and the problems intended to be addressed by the FSIA, strict enforcement of its technicalities here would be inappropriate.

Id. at 301.

Finally, several courts, in refusing to dismiss the plaintiff's claims due to a technical deficiency in service under the FSIA, have explained that the proper remedy is to afford the plaintiff time to reserve the defendant in compliance with the Act. "Thus, while requiring strict compliance with the requirements of the FSIA, where actual notice was received and no other defect existed these courts allowed the cases to go forward on the merits after the improper service was remedied." *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246 (6th Cir. 1993) (App. 8a). *See Alberti v. Empresca Nicaraguense de la Carner,* 705 F.2d 250 (7th Cir. 1983) (plaintiff not permitted to cure defect in service because court lacked subject matter jurisdiction); *Magnus Electronics, Inc. v. Royal Bank of Canada,* 720 F. Supp. 387 (N.D. Ill. 1985) (plaintiff not permitted to cure defect in service because court lacked subject matter jurisdiction); *Luccino v. Foreign Countries,* 631 F. Supp. 821 (E.D. Pa. 1986) (dismissal stayed to allow plaintiff the opportunity to effect proper service); *Lippus v. Dahlgren Mfg. Co.,* 644 F. Supp. 1473 (E.D.N.Y. 1986) (plaintiff afforded thirty days to serve defendant in compliance with the FSIA); *40 D 6262 Realty Corp. v. United Arab Emirates, Etc.*, 447 F. Supp. 710 (S.D.N.Y. 1978) (plaintiff permitted to effect proper service upon the defendant).

Defendant contends that there "should be only one position in the United States on the issue of whether strict or substantial compliance is required for effective service under the FSIA." (Petition at 18). In point of fact, there is only one such position; where actual notice of the lawsuit is received and substantial compliance with the Act is achieved, a technical deficiency in service will not defeat a cause of action. Where there is a dispute as to whether the defendant received actual notice, or the facts indicate that the defendant was prejudiced in its defense of the action due to a defect in service, the court will dismiss the action. The lower courts, including the Sixth Circuit, have consistently applied this test to actions involving an alleged defect in service under the FSIA.

III.

THE SIXTH CIRCUIT'S HOLDING IS CONSISTENT WITH THE MANDATES OF THIS COURT AND THE POLICIES BEHIND THE FSIA.

This Court has explained that the recent procedural changes in the Federal Court System were prompted by the "general purpose . . . of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits," *Goldlawr v. Heiman,* 369 U.S. 463, 465-466 (1962). In accordance with that general purpose, cases should, whenever possible, be decided not on technicalities, but rather on the merits.

Petitioner seeks a reversal of the decision of the Sixth Circuit. Such a ruling by this Court would permit petitioner to avoid adjudication on the merits because of a technical defect in service which could easily have been remedied, and which caused no prejudice to petitioner's defense of this action. Not only would such a decision be inconsistent with the general policy of deciding cases on the merits, but it would also be in conflict with the policies behind the FSIA. The Sixth Circuit recognized "the important policy which the translation requirement safeguards . . . [but] in light of CASA's actual notice and lack of prejudice, [the court was] reluctant to allow procedure to triumph over substance." *Sherer v. Construcciones Aeronauticas, S.A.,* 987 F.2d 1246 (6th Cir. 1993) (App. 8a).

"The purpose of the Act's requirements is to ensure actual notice to foreign states of the fact and substance of pending litigation." *Obenchain Corp. v. Corp. Nacionale de Inversions,* 656 F. Supp. 435, 437 (W.D. Pa. 1987).

> Congress clearly wanted to insure that a foreign government would be apprised of the

> pendency of the lawsuit because (b)(3) requires specifically that the service be "reasonably calculated to give actual notice. . . ." Comprehension of the court documents from a sovereign land is aided if they are accompanied by a translation in the defendant's language, especially if there may not be ready access to translators or interpreters. § 1608(b)(3) is therefore designed so that upon receipt of a Summons and Complaint in their own country, non-English-speaking governments will not be handicapped by a language barrier in their inability to respond to a distant lawsuit.

Lippus v. Dahlgren, 644 F. Supp. 1473, 1478-1479 (E.D.N.Y. 1986).

> Rather than making service on foreign instrumentalities a rigid, technical, or cumbersome procedure, Congress sought to facilitate the ability of private plaintiffs to serve foreign entities. In addition, Congress wished to insure that the sovereign owner would receive actual notice. H.R. Rep. No. 94-1487, *supra* at 23-24.

Velidor v. L/P/G Benghazi, 653 F.2d 812, 821 (3rd Cir. 1981). Accordingly, the decision of the Sixth Circuit is consistent with not only the policy behind the service provisions of the FSIA, but also with the greater purpose of the Act itself. Furthermore, the Sixth Circuit's decision advances the policy mandated by this Court that cases should, whenever possible, be adjudicated on the merits and not on procedural technicalities.

CONCLUSION

For the reasons set forth above, respondent respectfully requests that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

ROBERT A. MARCIS
Counsel of Record
SPANGENBERG, SHIBLEY, TRACI,
LANCIONE & LIBER
Attorneys for Respondent
1500 National City Bank Building
Cleveland, Ohio 44114
(216) 696-3232